

STATE OF MICHIGAN
COURT OF APPEALS

FRENS ORCHARDS, INC.,

Plaintiff-Appellant,

v

JASON RICHARD DUNNING, KARI
DUNNING, THOMAS J. PELL, MARY PELL,
DANIEL LEE PELL AND GLADYS JOY PELL
LIVING TRUST, by DANIEL LEE PELL,
Trustee, and GLADYS JOY PELL, Trustee, and
JOSEPH D. AND RENEE L. PELL LIVING
TRUST, by JOSEPH D. PELL, Trustee, and
RENEE L. PELL, Trustee,

Defendants-Appellees.

UNPUBLISHED
February 18, 2014

No. 312887
Newaygo Circuit Court
LC No. 12-019772-CH

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the granting of defendants' motion for summary disposition pursuant to MCR 2.116(I)(2) in this action regarding a right of first refusal. We affirm.

Plaintiff (Lessee), through its president, Brian Frens, entered into a lease agreement with LeRoy Deur (Lessor) and his wife, which indicated:

At the conclusion of this lease, that being the date of the last payment due herein, that being the first day of January, 1999, Lessee shall have the right of first refusal to purchase or lease the premises which are the subject of this lease in accordance with terms that may be agreed upon between the parties hereto. In the event that Lessor offers the above described premises for sale, Lessee shall have the right of first refusal as to any offers to purchase the said premises upon like terms as any offer which Lessor should deem acceptable.

After the lease expired, Deur visited Frens and informed him that he was going to sell the property. Deur indicated that because Frens had the right of first refusal, he was offering the property to him, but only for \$350,000 and only if he paid him that day. Frens did not exercise his right of first refusal. The Deurs then sold part of the property on March 31, 1999, for \$92,000 and the other part of the property on April 1, 1999 for \$50,000. Interests in the property

were transferred to various defendants. In 2011, Frens learned of the 1999 purchase prices. Plaintiff filed a complaint against defendants in 2012 and asked the trial court to order conveyance of the property for the original sale prices. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants requested summary disposition in their favor pursuant to MCR 2.116(I)(2), arguing that plaintiff's claim was barred by the statute of limitations. The trial court found that plaintiff's claim accrued in 1999 and was barred by MCL 600.5807(8), which states that the period of limitations to recover for breach of contract is six years. On appeal, plaintiff argues that the trial court should have applied MCL 600.5801(4), which states that the period of limitations to claim title in property is 15 years. We disagree.

"A court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment." *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 322; 808 NW2d 495 (2010). "Summary disposition is properly granted pursuant to MCR 2.116(C)(7) when the claim is barred by the applicable period of limitations," and "[w]hether a claim is barred by the applicable period of limitations is a question of law that we review de novo." *Adams v Adams*, 276 Mich App 704, 708; 742 NW2d 399 (2007).

"In deciding which period of limitations controls, we must first determine the true nature of the claim." *Id.* at 710. "The type of interest allegedly harmed is the focal point in determining which limitation period controls." *Id.*, quoting *Simmons v Apex Drug Stores, Inc.*, 201 Mich App 250, 253; 506 NW2d 562 (1993). "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams*, 276 Mich App at 710-711. "A right of first refusal, or preemptive right, is a conditional option to purchase dependent on the landowner's desire to sell." *Randolph v Reisig*, 272 Mich App 331, 336; 727 NW2d 388 (2006). "Michigan courts have generally treated [] agreements containing first-refusal rights as contracts, not property interests" *Id.* at 339. Once the holder of a right of first refusal is notified of an offer to purchase the property, the right of first refusal "transmutes" into an option agreement. *In re Smith Trust*, 274 Mich App 283, 287-288; 731 NW2d 810 (2007). An option contract that lacks a definite time for performance will be construed "to be for a reasonable period of time." *Randolph*, 272 Mich App at 337, quoting *Brauer v Hobbs*, 151 Mich App 769, 775-776; 391 NW2d 482 (1986). "An option to purchase does not create estate in land. No title, legal or equitable, is granted to the holder of the option by an option agreement." *Windiate v Leland*, 246 Mich 659, 665; 225 NW 620 (1929), citing *Keogh v Peck*, 316 Ill 318; 147 NE 266; 38 ALR 1151 (1925). "The holder of an option to purchase land does not have any interest in the premises prior to exercising the option." *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 38; 257 NW2d 260 (1977).

Here, once plaintiff was informed of the pending sale, his right of first refusal "transmuted" into an option contract. *In re Smith Trust*, 274 Mich App at 287-288. However, plaintiff did not exercise his right of first refusal; therefore, plaintiff had no interest in the property. *Windiate*, 246 Mich at 665; *Oshtemo Twp*, 77 Mich App at 38. Thus, plaintiff's claim was based on an option contract stemming from a right of first refusal, which is a contractual right. *In re Smith Trust*, 274 Mich App at 287-288, quoting 17 CJS, Contracts, § 55, p 502 ("[An option contract] is a contract right."). Therefore, MCL 600.5807 is applicable to plaintiff's claim. Under MCL 600.5827, a claim "accrues at the time the wrong upon which the claim is

based was done regardless of the time when damage results.” Plaintiff’s claim accrued in 1999 when he was not given the opportunity to exercise his “right of first refusal as to any offers to purchase the said premises upon like terms” within a “reasonable time” before the property was sold. *Randolph*, 272 Mich App at 337, quoting *Brauer*, 151 Mich App at 775-776. Because plaintiff did not file his claim until 2012, approximately seven years after his claim had expired in 2005, plaintiff’s claim is barred by the statute of limitations. MCL 600.5807(8). Thus, defendants were entitled to judgment pursuant to MCR 2.116(C)(7), and the trial court did not err in granting summary disposition. MCR 2.116(I)(2).

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering